

MONTGOMERY COUNTY, STATE OF MARYLAND

Cheryl A. Prentice,
Complainant

:
: COMMISSION ON COMMON
: OWNERSHIP COMMUNITIES

vs.

: Case No. 15-08
:
: Panel Hearing Date: October 15, 2008
: Decision Issued: February 6, 2009

Sierra Landing Condominium,
Respondent

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Panel Members: Mitchell I. Alkon
Karen Shakira Kali
John F. McCabe, Jr.

MEMORANDUM DECISION AND ORDER

The above captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended. The duly appointed Hearing Panel considered the testimony and evidence of record, and finds, determines and orders as follows:

BACKGROUND

This is a dispute filed by a unit owner, Cheryl A. Prentice (hereinafter “Complainant”) against her condominium, Sierra Landing Condominium (hereinafter “Respondent”). Complainant’s unit has experienced water infiltration beginning when she first purchased the unit in 1992. Complainant alleges that this water infiltration is due to improper care and maintenance by the Respondent condominium of the common elements to the rear of her unit, in particular the grading of the common elements and the maintenance and proper functioning of the five window wells at the rear of her unit.

The Respondent Condominium alleges that it has performed substantial remedial work to address the water infiltration problem and is not responsible for damages to Complainant's unit.

FINDINGS OF FACT

1. Complainant Cheryl A. Prentice is a unit owner in the condominium known as Sierra Landing Condominium. Complainant's unit is located below the level of the adjacent common grounds.

2. Respondent Sierra Landing Condominium is a 136 unit condominium organized under the Maryland Condominium Act, Real Property, Annotated Code of Maryland, Title 11.

3. Complainant's unit has experienced repeated water infiltration and resulting damage since 1992. Until approximately 2007, the water entered the unit from the five windows to the rear of the unit as well as from the ground beneath the unit.

4. In 2007 and thereafter, the Condominium performed extensive repairs and grading to the area to the rear of Complainant's unit and to Complainant's building. The repairs and maintenance to the Condominium building and grounds included replacing the roofs, replacing the downspouts and directing them into the storm sewer system, grading the area to the rear of Complainant's unit, installing below ground water proofing to the rear of Complainant's unit and repairing Complainant's window wells. The total amount spent exceeded \$920,000.00.

5. The last major flooding to Complainant's unit was in June 2006, prior to the extensive work performed by the Condominium described above. However, on February 13, 2008, April 21, 2008, and May 11, 2008 the window well to the rear of Complainant's unit adjacent to her living room filled and overflowed, doing extensive damage to the living room

floor and carpeting.

6. The testimony presented at the hearing on October 15, 2008, in particular the testimony of Complainant's daughter Nicole Prentice, established that during the time period after the extensive repairs made by the Condominium in 2007, water continued to infiltrate into Complainant's unit through the floor from the ground beneath the unit, and occasionally from the living room window well.

7. Complainant's daughter Larissa Prentice confirmed in her testimony that Complainant had given notice of this continued water infiltration to the Condominium at Board meetings and through the Condominium's management agent. Larissa Prentice attended several Board meetings with her mother.

8. Complainant also served on the Board of Directors of the Condominium. During that time she raised the issue of the water infiltration into her unit and into the adjacent ground floor unit at 11507 Amherst Avenue. Complainant's unit and the latter unit apparently were the only units in the 136 unit condominium that experienced the severe water infiltration problems described by Complainant.

9. With regard to 11507 Amherst Avenue, Unit 4, the Complainant presented evidence that sometime prior to June 30, 2006 the Condominium had settled a lawsuit brought by the owner of that property. The lawsuit involved the failure of the Condominium to maintain the common elements to prevent rainwater from entering 11507 Amherst Avenue. The problem recurred in 11507 Amherst Avenue after the lawsuit was settled. Complainant submitted a letter from the law office of Mark L. Hessell to Claude Lumpkins, Vista Management dated May 24, 2007 describing the recurrence of flooding in 11507 Amherst Avenue on June 30, 2006,

November 16, 2006 and January 1, 2007.

10. According to the evidence of record, Commission Exhibit 1, Complainant last had significant work done to repair water damage to her carpet on August 15, 2005, by Empire Today, LLC. Since then there has been additional water damage to Complainant's carpet and floors. Complainant submitted an estimate to repair or replace the flooring and carpet to her unit by Empire Today, LLC for a total of \$9,577.10. This estimate included laminated wood floors for the living room, dining room and hallway, removal of existing carpet, and installation of carpet in the three bedrooms and closets. The laminated wood floor work was in the amount of \$6,847.60; the carpet work was in the amount of \$2,729.50. Complainant testified that all of this damage was the result of water infiltration over the years. Respondent did not dispute this damage or these estimates.

11. A series of 21 photos submitted by Complainant for the period from 2006 to September 2008 establish extensive water infiltration and damage to the floors and walls of Complainant's unit. The photographs establish that on numerous occasions the floor of the unit was under water for a depth of at least 4 inches. The daughters, as well as the Complainant, testified to horrific living conditions as a result of the water infiltration, including dealing with the presence of mold, a stench of mildew, and the destruction of tangible personal property (some with irreplaceable personal memories).

12. The record contains a report by Environmental Science dated September 19, 2007 done on behalf of the Respondent Condominium. The report found evidence of mold under the surface of the vinyl sheet flooring in the kitchen and dining room of Complainant's unit, confirmed by laboratory analysis.

13. The five window wells to the rear of Complainant's unit and the area beyond the window wells to the rear of Complainant's unit are common elements and not part of the unit.

14. The Panel finds the following as a matter of fact:

a. At least one of the Complainant's window wells, apparently the one at the window to the living room, still fills with water and overflows even after the repair work done by the Condominium in 2007 and thereafter.

b. There is still water infiltration in Complainant's unit in isolated locations coming up through Complainant's floor from the ground beneath the unit.

c. As a result of the water infiltration in Complainant's unit over the years since 1992, there is now mold in various places in the unit, as confirmed by the Respondent Condominium's consultant, Environmental Science.

d. The Condominium has not determined the cause of water infiltration through the floor of Complainant's unit or from the window wells, and therefore has not corrected the problems.

e. The Condominium has not remediated the mold in Complainant's unit.

f. The Condominium has not repaired or replaced Complainant's carpet and floors.

15. With regard to the unit at 11507 Amherst Avenue the Condominium has settled with the owner of the unit for damages resulting from water infiltration prior to 2007.

16. The sources of the water infiltration into Complainant's unit are the common elements adjacent to and under her unit.

CONCLUSIONS OF LAW

1. The Sierra Landing Condominium By-laws provide in Article VI, Section 6(a) that the Board of Directors is responsible for the maintenance, repair and replacement of all of the common elements. The Maryland Condominium Act, Section 11-108.1, Real Property, Annotated Code of Maryland, also places this responsibility on the Condominium. That provision states that except to the extent otherwise provided by the Declaration or By-laws the Council of Unit Owners is responsible for maintenance, repair and replacement of the common elements. The Panel concludes that these provisions create a duty running from the Condominium to the unit owners. The Condominium is clearly on notice of this duty since it appears both in its By-laws and in the Maryland Condominium Act. Therefore, if this duty is breached and as a proximate cause of that breach a unit owner suffers property damage, the Condominium should be held responsible. As to the existence of a cause of action for breach of fiduciary duty in Maryland see Kann v. Kann, 344 Md. 689, 609 A.2d 509 (1997). As to the existence of a fiduciary duty running from a Condominium to its unit owners see Moshyedi v. Council of Unit Owners of Annapolis Road Medical Center Condominium, 132 Md. App 184, 752 A.2d 279 (2000).

In Moshyedi the Court of Appeals of Maryland recognized that the failure of a Board of Directors to perform a duty that is mandatory under the by-laws of a condominium constitutes a breach of its fiduciary duty. In the Moshyedi case, the requirement was to arrange for the prompt

repair and restoration of a unit after a casualty loss and to devote insurance proceeds to that purpose. In this case, by statute as well as under the By-laws, the duty is to maintain the common elements. The common elements include the grounds to the rear of Complainant's unit,

as well as the window wells for the five windows at the rear of Complainant's unit and the ground under Complainant's unit. The water infiltration is coming from one or a combination of these common element sources.

2. The limitation of liability presented by the Condominium in Attachment A to Respondent's Exhibit 1, Article XIV, Section 4 of the By-laws does not apply in the present case. The Panel reads this provision to apply only to casualty losses which are in the nature of "acts of God". That is, while the Condominium may not be responsible for injury or damages caused by the elements under some circumstances it is responsible for injury or damages, from the elements or otherwise, caused by its own failure to properly maintain the common elements of the Condominium. Maryland allows exculpatory clauses but construes them narrowly. Crockett v. Crothers, 264 Md. 222, 285 A.2d 612 (1972). The Panel understands the Condominium documents must be read as a whole and consistently with the Maryland Condominium Act. The Panel concludes that it would be unreasonable to find on one hand that the Maryland Condominium Act creates a duty in the Condominium to maintain the common elements, and the Condominium's By-laws create the same duty, but on the other hand that in another provision in the By-laws take that same duty away by depriving unit owners of a remedy for breach of the duty. The best way to reconcile all of these provisions is to find that Article XIV, Section 4 of the By-laws protects the Condominium from strict liability as to the

incidents described but does not protect the Condominium from its own negligence, in particular negligence and failure to perform that have extended over a period of years and resulted in the damage as presented in this case. There is no question that the failure to maintain the common elements is the proximate cause of the property damage suffered by the Complainant. The only way that the Condominium avoids liability is through a broad interpretation of this exculpatory clause, which the Panel declines to do.

While the Panel was preparing the Memorandum Decision and Order, it noted that the parties had not filed in the record a complete set of the governing documents for Sierra Landing Condominium. The Panel therefore reopened the record for the limited purpose of receiving those documents.

The Condominium's By-laws, Article VII, Section 1(b) require the Condominium to carry public liability insurance:

“covering all claims for bodily injuries and/or property damage...including...liability for property of others and such other risks as shall customarily be covered with respect to projects similar in construction, location and use, including any and all other liability incident to the ownership and use of the Condominium or any portion thereof..”

By-laws, Article VII, Section 2(d) requires that such policies contain no provision relieving the insurer from liability by reason of any negligence on the part of the Board of Directors or any owner.

Also particularly relevant in this case is Paragraph 14 of the House Rules of the Condominium which provides in part with respect to water leaks:

“If the leak is occurring...through a wall, the Association will pay the cost of stopping the leak and will repair any damage to the common areas and/or individual units (excluding personal property).”

These excerpts from the governing documents of the Condominium reinforce the Panel's conclusion that the limitation of liability contained in Article XIV, Section 4 of the By-laws does not apply to the present case. If the Condominium were somehow immune from liability for its own negligent actions, at least as they relate to its relationship with its unit owners, then these insurance provisions might be less inclusive. Furthermore, Section 14 of the House Rules expressly states that the Condominium will pay the cost to repair damages to a unit resulting from water leaking through a wall. Section 14 appears not to require even a showing of negligence. Therefore, the tenor of the governing documents, when read as a whole, is that the Condominium in fact will be responsible for its own negligence. The facts of this case establish that the Condominium has been negligent.

3. The facts of this case establish that for a period of time up to approximately 2007, Complainant's unit experienced severe water infiltration and that the source of that infiltration was the common elements. The facts also establish that when the Condominium spent the funds necessary to maintain Complainant's building, re-grade the common elements, and maintain and repair the window wells to the rear of Complainant's unit, the water infiltration decreased significantly. However the water infiltration did not cease. In at least in one window well and through the floor of Complainant's unit there is still water infiltration. These facts lead the Panel to the conclusion that the cause of the damage from the water infiltration into Complainant's unit was the failure of the Condominium to maintain properly its common elements surrounding and under the Complainant's unit. Once the Condominium began to do so, the problem was substantially but not completely resolved.

4. There is still some water infiltration into Complainant's unit. There is also mold,

as confirmed by the Condominium's own consultant, in Complainant's unit. This continued water infiltration, mold, and damage to Complainant's floors and carpet are the direct result of the Condominium's failure to maintain the common elements. This failure is not an act of God covered by Article XIV, Section 4 of the By-laws, Respondent's Exhibit 1, Tab A.

5. The Panel therefore concludes that the Condominium remains responsible for the following in order to fulfill its fiduciary duty to maintain the common elements:

- a. Determining conclusively the source and cause of the continued water infiltration into Complainant's unit through her floor and window wells and taking measures to stop water infiltration.
- b. Determining whether or not mold exists throughout Complainant's entire unit.
- c. Remediating any mold throughout Complainant's unit.
- d. Replacing the damaged carpeting and flooring in Complainant's unit.

6. With regard to replacing the flooring and carpeting throughout Complainant's unit, the uncontradicted evidence of record establishes that the cost to do so is \$9,577.10. That is

the cost for new flooring and carpeting as of October 11, 2008.

7. The Panel has the authority to award damages under Section 10B-13(e) of the Montgomery County Code.

Based upon the foregoing Findings of Fact and Conclusions of Law it is as of the effective date of this Decision and Order,

ORDERED:

1. Within thirty (30) days from the effective date of this Order Respondent

Condominium shall have an appropriate consultant inspect the Complainant's unit to determine the source and cause of the water infiltration through the floor of Complainant's unit at the cost of the Condominium. Within a reasonable time thereafter, depending upon the findings, the Condominium shall make the necessary repairs/corrections to eliminate the infiltration of water into Complainant's unit from all sources, whether ground, window wells, adjacent common elements or other, at the cost of the Condominium.

2. Within thirty (30) days from the effective date of this Order the Condominium shall take appropriate measures with the advice of a consultant to remediate the mold contained throughout Complainant's unit at the cost of the Condominium.

3. Within thirty (30) days from the effective date of this Order Respondent Condominium shall pay to Complainant \$9,577.10.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days of this Order, pursuant to the Maryland Rules of Procedures governing administrative appeals.

The decision of the Panel is unanimous.

John F. McCabe, Jr., Panel Chair
February 6, 2009